UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:	Case No. 01-16667
NEXTLEC, INC.	Chapter 11

MEMORANDUM AND ORDER

Appearances: Fred T. Hanzelik, Chattanooga, Tennessee, Attorney for Michael Cunnyngham

Richard Klingler, Kennedy, Koontz & Farinash, Chattanooga, Tennessee, Attorneys for Debtor

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The question for the court in this Chapter 11 case is whether to grant or deny the motion by Michael Cunnyngham to lift the automatic stay, which is imposed by Bankruptcy Code § 362, so that Mr. Cunnyngham can sue the debtor in state court. 11 U.S.C. § 362(a). At the conclusion of the hearing on the motion, the court denied relief from the stay but did not immediately enter an order. On further consideration and after reviewing the authorities cited by the parties, the court is of the opinion that the automatic stay should be modified.

Mr. Cunnyngham's amended motion states that he was an employee of the debtor, Nextlec, that his employment was terminated before Nextlec filed this bankruptcy case, and that he is a party to an employment agreement with Nextlec's predecessor, Talon Communications. The motion goes on to state that the "debtor, through its attorneys, has wrongfully and maliciously been sending threatening letters to various prospective employers, even though all concerned are aware and know that Cunnyngham is not bound, as a matter of fact or law, to any purported covenant not to compete." The motion further states:

> Debtor has, and continues to, damage Cunnyngham with threatening letters and continued attempts to scare prospective employers with the threat of suit if they hire him. Cunnyngham wants the appropriate court to determine his rights.
>
> Cunnyngham, throughout his employment, worked for other employees [sic] with the consent and agreement of the debtor. Also, the Agreement, on its face provides for allowance of employment to others. Movant also, based upon Tennessee law, would assert that there is no

> binding Agreement in effect. These issues, inter alia, need to be determined.

The motion also states that the employment agreement gives exclusive jurisdiction to determine disputes under the agreement to the Chancery Court of Hamilton County, Tennessee or the United States District Court for the Eastern District of Tennessee.

Section 5 of the employment agreement provides:

> Employee shall hold in a fiduciary capacity for the benefit of Employer all secret or confidential information, knowledge or data relating to Employer and its subsidiaries which shall be obtained by Employee during Employee's employment by Employer which shall not become public knowledge (other than by acts by Employee in violation of this Agreement). Employee acknowledges that all intellectual property which he has developed since he began his employment with Employer belongs to Employer, is considered work made for hire, and is subject to the restrictions of this Section. After termination of Employee's employment with Employer, Employee shall not, without the prior written consent of Employer, communicate or divulge any such information, knowledge or data to anyone other than Employer and those designated by it.

Section 6 of the employment agreement provides:

> In consideration of the execution of this agreement . . . and the compensation to be paid Employee hereunder, Employee agrees that while he is an employee and until the earlier of the end of the Employment Period . . . or thirty (30) days after the expiration of the restrictions under [SEC] Rule 144 . . . as such rule affects

> the current investors of Employer ("Non-competition Period"), Employee will not directly or indirectly engage or invest in, or counsel, or advise, or be employed by any business enterprise competing with the services and/or product lines of Employer ("Competitive Business"). . . .

Section 6 continues with a more detailed description of competitive business and a restriction on Mr. Cunnyngham's dealings with employees and suppliers of the employer.

Section 7 of the employment agreement gives the employer the right to obtain an injunction against Mr. Cunnyngham for violations of the confidential information or non-competition sections of the agreement.

Section 9 provides that the employment agreement shall be governed by the law of Tennessee. Section 9 also provides:

> The parties agree that proper jurisdiction and venue shall lie exclusively in the state courts of Hamilton County, Tennessee, and the United States District Court for the Eastern District of Tennessee.

At the hearing on Mr. Cunnyngham's motion to lift the stay, neither party presented any additional evidence.

Mr. Cunnyngham argued that the court does not have subject matter jurisdiction. The court certainly has subject matter jurisdiction as to whether Mr. Cunnyngham is subject to or has violated the non-competition provisions in the employment contract. The dispute may be a related proceeding instead of a core

proceeding, as those terms are used in the jurisdiction statutes. 28 U.S.C. §§ 157(b) & 1334(b). Of course, the court has subject matter jurisdiction since the dispute is at least a related proceeding. *Sun Healthcare Group, Inc. v. Levin (In re Sun Healthcare Group, Inc.)*, 267 B.R. 673 (Bankr. D. Del. 2000)(related); *American Business Supply, Inc. v. Reynolds (In re American Business Supply, Inc.)*, 182 B.R. 580 (Bankr. D. Kan. 1995)(related); *Smith v. East Hill Manufacturing Corp. (In re East Hill Manufacturing Corp.)*, 200 B.R. 535 (D. Vt. 1996(core).

Mr. Cunnyngham also argued that the forum selection clause in the employment contract requires the dispute to be tried in the Chancery Court of Hamilton County, Tennessee or the federal district court for this district. In this regard, Mr. Cunnyngham seems to be picking and choosing the parts of the employment agreement that he wants to be effective and those that he does not want to be effective. He wants the forum selection clause to be given effect but not the non-competition agreement. This impression, however, may be the result of an overstatement in the motion when it alleges "there is no binding Agreement in effect." This allegation may be directed at the non-competition portion of the employment agreement. Certainly one part of an agreement may become legally ineffective while other parts remain effective. The court takes this to be Mr. Cunnyngham's argument.

The policy of the bankruptcy law to centralize disputes in the bankruptcy court does not automatically allow the bankruptcy court to ignore forum selection clauses in the debtor's contracts. The courts have developed the rule that forum selection clauses generally will be enforced in non-core proceedings. *McCrary & Dunlap Construction Co.*

v. CED Construction Partners (In re McCrary & Dunlap Construction Co.), 256 B.R. 264 (Bankr. M. D. Tenn. 2000); *N. Parent, Inc. v. Cotter & Company (In re N. Parent, Inc.)*, 221 B.R. 609 (Bankr. D. Mass. 1998); *Kamine/Besicorp Allegany v. Rochester Gas & Electric Co. (In re Kamine/Besicorp Allegany)*, 214 B.R. 953 (Bankr. D. N. J. 1997); *Brown v. Lloyd's (In re Brown)*, 219 B.R. 725 (Bankr. S. D. Tex. 1997).

The majority of courts have held that disputes over enforcement or the meaning of a non-competition agreement between the debtor and another party are non-core proceedings. This includes a dispute over whether the non-competition agreement is legally effective. This court agrees with that reasoning. Thus, it appears that the dispute between Mr. Cunnyngham and the debtor as to the non-competition agreement would be a non-core proceeding if tried in this court. *Sun Healthcare Group, Inc. v. Levin (In re Sun Healthcare Group, Inc.)*, 267 B.R. 673 (Bankr. D. Del. 2000)(related); *American Business Supply, Inc. v. Reynolds (In re American Business Supply, Inc.)*, 182 B.R. 580 (Bankr. D. Kan. 1995)(related); *Smith v. East Hill Manufacturing Corp. (In re East Hill Manufacturing Corp.)*, 200 B.R. 535 (D. Vt. 1996(core).

In non-core proceedings the bankruptcy courts have dealt with forum selection clauses according to the general rules that apply to such clauses in the federal courts. The forum selection clause will be enforced unless the opposing party proves that enforcement would be unreasonable in the circumstances. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Enforcement is unreasonable if (1) inclusion of the clause in the contract was the result of fraud or overreaching, or (2) enforcement would violate a strong public policy of the forum where the suit is pending,

or (3) the selected forum is so seriously inconvenient that it would deprive the opposing party of its day in court. *McCrary & Dunlap Construction Co. v. CED Construction Partners (In re McCrary & Dunlap Construction Co.)*, 256 B.R. 264, 266 (Bankr. M. D. Tenn. 2000), *citing Shell v. R. W. Sturge, Ltd.*, 55 F.3d 1227, 1229-1230 (6th Cir. 1995).

The court has already pointed out that in non-core proceedings the policy of centralizing litigation in the bankruptcy court is not a such a strong public policy of the forum that enforcement of the forum selection clause would be unreasonable. The debtor has not attempted to show either of the other grounds for refusing to enforce the forum selection clause. Of course, the debtor would prefer not to deal with a state court lawsuit by Mr. Cunnyngham, but that does not show such a serious inconvenience that the forum selection clause should not be enforced.

This brings the court to the question of whether the forum selection clause makes any difference at this point. Neither the debtor nor Mr. Cunnyngham has brought suit in any court to enforce or avoid the non-competition agreement. Mr. Cunnyngham, however, wants to bring suit in state court. He argues the forum selection clause as a ground for lifting the stay on the theory that it does not allow a suit in the bankruptcy court.

This may be too narrow an interpretation of the forum selection clause. It allows suit in the federal district court, and this court is a unit of the federal district court for this district. 28 U.S.C. §§ 151 & 157. Thus, the forum selection clause may allow a suit in this court. But the question now before the court is whether to lift the stay to allow Mr.

Cunnyngham to bring suit in state court. For the purpose of argument, the court can assume that the forum selection clause allows a suit in this court.

Mr. Cunnyngham wants to be allowed to sue in state court so that he can obtain employment without a cloud of uncertainty hanging over him as a result of the non-competition agreement. The bankruptcy courts have regularly been called upon to deal with non-competition agreements. Nevertheless, the issues of contract law are governed by Tennessee law, and the Tennessee courts should be more familiar with the law. The debtor can hardly complain about the inconvenience of going to the Chancery Court of Hamilton County compared to trying the case in this court. The Chancery Court is less than six blocks from here. The treatment of non-core proceedings in the bankruptcy court would also give the debtor the opportunity to delay a final decision in this court by not consenting to a final decision. 28 U.S.C. § 157(c).

The bankruptcy courts have regularly lifted the automatic stay to allow state court suits seeking to enjoin the debtor from violating the non-competition agreement. *In re Hughes*, 166 B.R. 103 (Bankr. S. D. Ohio 1994); *R. J. Carbone Co. v. Nyren (In re Nyren)*, 187 B.R. 424 (Bankr. D. Conn. 1995); *Sir Speedy, Inc. v. Morse (In re Morse)*, 256 B.R. 657 (D. Mass. 2000); *In re Annabel*, 263 B.R. 19 (Bankr. N. D. N. Y. 2001); *see also Hohol v. Essex Industries, Inc. (In re Hohol)*, 141 B.R. 293 (M. D. Pa. 1992)(stay lifted to allow plaintiff to pursue contempt for violating injunction); *In re Veit*, 227 B.R. 873 (Bankr. S. D. Ind. 1998)(stay lifted to allow plaintiff to pursue contempt for violating injunction).

One court lifted the stay to allow a former employee to bring suit in state court to determine the validity of a non-competition agreement with the debtor. *Sun Healthcare Group, Inc. v. Levin (In re Sun Healthcare Group, Inc.)*, 267 B.R. 673 (Bankr. D. Del. 2000). In the same situation, another court concluded that the automatic stay did not apply. *In re Newman Companies of Wis., Inc.*, 45 B.R. 308 (Bankr. E. D. Wis. 1985).

In summary, the court can see no good reason for completely denying relief from the stay so that Mr. Cunnyngham can bring suit in state court. The court, however, will limit the issues that can be tried.

If the state court decides that the non-competition agreement is unenforceable, then Mr. Cunnyngham may have a claim against the debtor for damages, which would be a claim in the debtor's bankruptcy case. He could possibly have a claim for damages even if the state court decides that the non-competition agreement is enforceable. At this time the court will not lift the stay to allow the state court to make a determination of any damages due to Mr. Cunnyngham. The court will lift the stay to allow Mr. Cunnyngham to obtain a decision on whether or to what extent the non-competition agreement is enforceable. Mr. Cunnyngham can also obtain an appropriate injunction from the state court to enforce its decision. This includes an injunction to limit the manner in which the debtor can enforce the non-competition agreement, if it is enforceable. Accordingly,

IT IS ORDERED that the automatic stay is modified to allow Michael Cunnyngham to obtain a decision in the appropriate court on the issues of whether or to

what extent the non-competition agreement between him and the debtor, Nextlec, is enforceable and to allow the state court to enter an injunction against the debtor to prohibit enforcement of the non-competition agreement, if it is unenforceable, or to limit the methods by which the debtor can enforce the non-competition agreement, if it is enforceable.

ENTER:

BY THE COURT

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R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 1/10/02]